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IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

RICHARD D. SLAUTTERBACK, SANDRA L. SLAUTTERBACK, TRUSTEE, AMERICAN OWNER OPERATOR UNDERWRITERS, INC. and AMERICAN TRUCK UNDERWRITERS HOLDING CORPORATION,

Petitioners,

vs.

IPC MUTUAL INDEMNITY, LIMITED,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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STATEMENT PURSUANT TO RULE 29.6

The Respondent agrees to the list provided by Petitioner in the Petition for Certiorari.

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SUMMARY OF ARGUMENT

This Petition should not be granted because the issues raised do not meet the Court's criteria for granting such petitions:

A. The criteria emphasize cases of national importance, including resolution of conflicts between the Circuits. This case does not meet those criteria.

B. The questions in this case are simple procedural questions involving denial of leave to amend Petitioner's Complaint, or are questions resolved under Georgia law. Moreover, several issues argued by Petitioners were not presented to the Courts below.

ARGUMENT

A. The Court's Criteria for Granting Petitions for Certiorari.

The Court's Rule 10 gives the following examples of the type of cases this Court considers in granting petitions for certiorari:

1. A conflict between Courts of Appeal on an important matter;

2. A conflict between a United States Court of Appeals and a state court of last resort regarding an important federal question;

3. A departure from the accepted and usual course of judicial proceedings, which calls for the exercise of the Court's supervisory power;

4. A conflict between a decision of a state court and a United States Court of Appeals on an important question of federal law, which should be resolved by this court.

The Rule states that a petition is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law. This Court is not concerned with correcting errors in lower court decisions, but rather with deciding cases which present issues of importance beyond the facts and parties involved.

B. Explanation of Why Each of the Issues Presented by Petitioners Does Not Meet the Criteria for Granting Petitions for Certiorari.

Respondent will discuss the "Reasons for Granting the Writ," as stated by Petitioner, beginning at page 11 of its Petition.[1]

1. "*Resolution of the Split Among the Circuits*"

Petitioners argue that this Court should accept this case in order to resolve a split among the Circuits "as to what facts either start or stop the running of the statute of limitations." (Petition, p. 11). This conflict, Petitioners say, is acknowledged in *Klehr v. A.O. Smith Corporation*, 521 U.S. 179, 117 S. Ct. 1984, 138 L. Ed. 2d 373 (1997).

Petitioners' argument on this point is both incorrect and actively misleading.

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1. These "Reasons" do not coincide with the "Questions Presented" on page i of the Petition. The "Reasons" also do not coincide with the arguments in the body of the Petition.

In *Klehr*, this Court decided to wait for a more suitable case in which to resolve a conflict between the Circuits as to what "discovery rule" applied to the running of the statute of limitations governing the federal RICO statute *Klehr*, *supra*, 117 S. Ct. at 1992. In this case, however, no question of the "discovery rule" for RICO claims arises, because the District Court simply denied Petitioners permission to add a RICO count to their complaint. (District Court opinion, attached to Petition as Appendix C, p. 15(a)).

The only question presented regarding Petitioners' RICO claim is whether the District Court correctly applied Rule 15(a), Fed. R. Civ. P. The District Court held that Petitioners had no right to amend their complaint more than two years after the complaint was filed; three months after discovery ended; and, one month after Respondent had filed a motion for summary judgment in the District Court — without giving any excuse for such delays. (*Id.* pp. 13(a)-14(a)). The District Court's ruling is manifestly a discretionary one, which was affirmed without opinion by the Eleventh Circuit Court of Appeals under its Rule 36-1.[2]

The Petition necessarily implies that this case turns on applying the substantive law governing RICO, whereas all it involves, in fact, is Petitioners' inability to amend their complaint.

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2. Eleventh Circuit Rule 36-1 provides that where, for example, a summary judgment is supported by the record (sub-paragraph (a)), or a judgment is entered without a reversible error of law (sub-paragraph (e)), and an affirming opinion would have no precedential value, an order may be affirmed without opinion. The Eleventh Circuit uses this rule to affirm decisions where the issues presented by the Appellant are without merit and do not warrant discussion, *United States v. Coy*, 19 F.3d 629, 635 (11th Cir. 1994).

Not only did the ruling below on Petitioners' RICO claim not involve applying the Eleventh Circuit's "discovery rule" for RICO claims, but, if it had, Petitioners would have already had the benefit of the "more liberal" discovery rule. For this additional reason, Petitioners' statement that "[T]he facts and issues in the case below provide just that opportunity [to resolve the split between the Circuits]" is disingenuous at best, and apparently intended to mislead.

In the Eleventh Circuit, the statute of limitations does not begin to run against a civil RICO claim until the plaintiff knows of the injury and that it is part of a pattern. *Bivens Gardens Office Building, Inc. v. Barnett Bank of Florida, Inc.*, 906 F.2d 1546, 1554-55 (11th Cir. 1990). The Court in *Klehr* refused to reconcile conflicts between the "injury and pattern" rule (as in the *Bivens* case) and the "injury discovery" rule applied, for example, in the Ninth Circuit. *Klehr, supra*, 117 S. Ct. at 1992.

One of the specific reasons the Court declined to resolve the split is that the facts of *Klehr* did not "force focused argument" on the merits of these approaches. In particular, the plaintiffs in the *Klehr* case already had the benefit of the more liberal "accrual" rule, just as the Petitioners would have in this case. That is, this Court's "resolving the split" on this issue could not benefit these Petitioners, because the most favorable outcome of such a decision for them would result in the Court's choosing the *Bivens* standard, which would already apply to this case.

2. *Other Assertions by Petitioners*

a. *Procedural Background*

The remaining assertions scattered throughout the Petition involve the District Court's rulings on questions of Georgia

state law. Respondent will only comment briefly on these, as this Court has stated that:

> [W]e ordinarily accept the determinations of Courts of Appeal on questions of state law. . . .

Richards v. United States, 369 U.S. 1, 16, n.35, 82 S. Ct. 585, 594, n.35, 7 L. Ed. 2d 492, __, n.35 (1962).

The District Court denied leave to amend the Petitioners' Complaint to add a RICO claim, as discussed above. The District Court also granted summary judgment to Respondent against all of Petitioners' other claims, which were a breach of contract claim and several tort claims. The District Court's decision rested on the Petitioners having filed suit outside of the statute of limitations. Petitioners argued that they actually "discovered" their causes of action very late and that their lawsuit was timely if this later "discovery" date was used. The District Court ruled that Petitioners had actual knowledge of the events underlying their claims long before this alleged "discovery." Specifically, the District Court found that the Petitioners had admitted that they knew that "something was bad wrong" in 1986, and that their attorneys, in 1988, sent letters to Respondent demanding compensation. Both the 1986 and 1988 dates put Petitioners outside of the state statutes of limitation for their claims. (*See* District Court opinion, pp. 23a-24a). These undisputed facts were the basis for the District Court's finding that the statute of limitations had run against all of Petitioners' claims.

In the Court of Appeals, Petitioners attempted to raise several arguments which they had not presented to the District Court. The Court of Appeals rejected Petitioners' attempts to bring previously unpled issues into the case by affirming the District Court's decision without opinion under Circuit Rule 36-1 (*See* footnote 1 above).

None of these issues meet the criteria for granting this petition, in that (1) all involve applying specific Georgia statutes and cases to the particular facts of this case; or (2) they attempt to raise issues which were not presented to the trial court.

b. *Specific State Law Issues*

1. *Tolling Statutes of Limitation*

Petitioners argue that Georgia statutes of limitation should be tolled because Petitioners did not have sufficient knowledge of their claims to sue, and that a "confidential relationship" between Petitioners and Respondent tolled the statutes.

Foremost, the District Court found, upon undisputed facts, that Petitioners had actual knowledge of the events which Petitioners say gave rise to their claims. Under those circumstances, there could be no tolling of the statutes of limitation. The "tolling" statute (O.C.G.A. § 9-3-96) is strictly construed by the Georgia courts. *Bates v. Metropolitan Transit System*, 128 Ga. App. 720, 197 S.E. 2d 781 (1973).

Moreover, the District Court found that it was irrelevant whether the parties had a "confidential relationship." The existence of a "confidential relationship" may excuse a party from its ordinary duty of inquiry. If, however, the party actually knows the facts, the confidential relationship is irrelevant. The District Court found actual knowledge.

Further, under Georgia law, there is no confidential relationship in an arms-length business transaction. The Georgia Court of Appeals has stated that the fact that parties to a business transaction trust each other does not create a confidential relationship. *Kienel v. Lanier*, 190 Ga. App. 201, 203, 378 S.E. 2d 359, 378 (1989).

2. *Statute of Limitations for Mutual Accounts*

Petitioners contend that the District Court should have applied a Georgia statute governing "mutual accounts" (O.C.G.A. § 9-3-7). Under that statute, the statute of limitations runs from the date of the "last item thereof." Petitioners did not present this argument to the District Court; furthermore, the "mutual account" statute does not apply to the facts of this case.

Petitioners state that: "[T]he District Court's order, however, did not address the effect of this statute." Petitioners thus attempt to make it appear that the District Court had before it and should have considered this argument. In fact, the argument was not presented to the District Court, as pointed out by Respondent in its Brief in the Court of Appeals.

Petitioners argued to the Court of Appeals that the "mutual account" theory was not a new issue but a "more elegant rationale" for the other arguments made by Petitioner. The Court of Appeals properly did not consider the "mutual account" rationale, as evidenced by its affirmance of the District Court's decision without opinion.

This refusal was proper in light of the Circuit's rule that issues not raised below will not normally be considered. *See, e.g., Roofing & Sheet Metal Services v. La Quinta Motor Inns*, 689 F.2d 982, 989 (11th Cir. 1982) (requires "miscarriage of justice"); *Dean Witter Reynolds v. Fernandez*, 741 F.2d 355, 360-61 (11th Cir. 1984) (recognizing "exceptional circumstances"); *FDIC v. Verex Assurance, Inc.*, 3 F.3d 391, 395 (11th Cir. 1993) (considered "substantial justice" reason to apply only to vindication of fundamental constitutional rights).

The insurance transactions between Petitioners and Respondent are not, in any event, "mutual accounts," for purposes of the Georgia statutes of limitations. Mutual accounts are accounts based on an open-ended course of dealing in which the parties borrow and lend from each other (e.g., *Turner v. Davidson*, 188 Ga. 736, 4 S.E. 2d 814 (1939), in which Turner and Davidson carried on a running account for 13 years). The Georgia Supreme Court has held that the reason the statute of limitations does not run on a mutual account until the last entry is that the parties have not established a time when the accounts will be balanced, and the balance becomes due. *See Gunn v. Gunn*, 74 Ga. 555 (1885) (brothers borrowing from each other). The mutual account statute simply does not apply to a commercial transaction such as this one, in which the terms for performance were explicitly set out in advance.

3. *Statute of Limitations for Suits Against Fiduciaries*

This theory, as with the "mutual account" claim discussed above, was never presented to the District Court.

Petitioners argue that a 10-year statute of limitations for suits against "executors, administrators, guardians, or trustees" applies to this case. (O.C.G.A. § 9-3-27). That statute, however, applies, for example, to suits by the beneficiaries of trusts, but not actions by creditors. *Murray v. Baldwin*, 69 Ga. App. 473, 26 S.E. 2d 133 (1943).

Petitioners argue that a "constructive trust" arises out of the parties' insurance transactions, because they are subject to the requirements of "utmost good faith." The duty of "utmost good faith" in the law of reinsurance runs between a ceding insurer and a re-insurer. *Compagnie de Reassurance d'Ile de Farence v. New England Reinsurance Corporation*, 57 F.3d 56, 72 (1st Cir. 1995). Petitioners fit into neither of these categories.

Even in cases between insurers and re-insurers, in which a higher duty might apply, the courts analyze the underlying disputes under governing state law. *Id.* at 74. In fact, the Third Circuit held that the duty of utmost good faith would not permit a dissatisfied party to expand the terms of a bargained for contract. *Id.* at 81.

CONCLUSION

This case does not meet any of the criteria for granting a Petition for Certiorari.

The decisions below concern a purely discretionary decision not to permit a tardy amendment to Petitioners' Complaint, and rulings that Petitioners' claims were barred by the Georgia statutes of limitation. These rulings were upheld by the Court of Appeals without any opinion.

This case simply has no importance beyond the parties involved. The Petition for a Writ of Certiorari should therefore be denied.

Respectfully submitted,

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